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Issue Date: 30 June 2004

CASE NO.: 2003-LHC-1556

OWCP NO.: 07-158812

IN THE MATTER OF:

KIRBY ELLIOT

Claimant

v.

B&D CONTRACTING, INC.

Employer

and

ZURICH AMERICAN INSURANCE, INC.

Carrier[1]

APPEARANCES:

HENRY B. ZUBER, ESQ.

For The Claimant

RICHARD S. VALE, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor

[1] The caption appears as amended at the formal hearing.

Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Kirby Elliot (Claimant) against B&D Contracting, Inc. (Employer) and Zurich American Insurance, Inc. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on November 10, 2003, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 31 exhibits. Employer/Carrier proffered 16 exhibits, which were admitted into evidence along with one Joint Exhibit,[2] and the record was closed.[3] This decision is based upon a full consideration of the entire record.

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

[3] Employer/Carrier did not submit their exhibit number 14, Claimant's tax returns for the years 1999, 2000, 2001 and 2002. On July 15, 2003, Employer/Carrier propounded discovery requests, including a request for the production of Claimant's state and federal income tax returns for the years since 1999. Claimant did not produce the records. On August 7, 2003, Claimant indicated in his deposition that his records for the years 2000 through 2002 were in storage. He indicated he should be able to physically provide the records which Employer/Carrier requested. After Claimant failed to produce the requested information, Employer/Carrier served Claimant's counsel with a subpoena, which was signed by the undersigned on September 24, 2003, directing Claimant to produce the records, but Claimant failed to comply.

On October 9, 2003, Employer filed a Motion to Compel in which they requested sanctions for Claimant's failure to comply with their request for the production of documents. Claimant filed a reply indicating he hand-delivered his responses to Employer/Carrier's August 7, 2003 discovery requests on October 1, 2003. In Claimant's response to discovery requests, he did not produce the requested tax returns, but provided releases for Employer/Carrier to obtain the tax information from the relevant government agencies.

Post-hearing briefs were received from the Claimant and the Employer/Carrier on January 20, 2003. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (Tr. 21-22; JX-1), and I find:

1. That Claimant was injured on December 13, 2000.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on December 13, 2000.

5. That Employer/Carrier filed Notices of Controversion on December 19, 2000, March 20, 2002, August 2, 2002, and November 21, 2002.

6. That an informal conference before the District Director was held on December 12, 2002.

7. That Claimant received temporary total disability benefits from December 15, 2000, through April 24, 2001, at a weekly compensation rate of $233.46 for 18.714 weeks, for total compensation benefits of $4,368.97.

At the hearing, Employer/Carrier explained that they requested the information from the government agencies, but had not yet received responses. It was noted that post-hearing development might take an additional six months in anticipation of receiving the requested information. Employer/Carrier successfully requested an adverse inference be drawn that the records would show that Claimant earned as much or more post-injury than he earned before his job injury. (Tr. 15-19; EX-13, p. 9; EX-17, pp. 40-42; CX-9, pp. 14-16; CX-13, p. 3).

8. Medical benefits were paid pursuant to Section 7 of the Act.

9. Claimant's counsel received Employer/Carrier's subpoena directing the production of Claimant's tax returns for the years 1999, 2000, 2001 and 2002.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability.

2. Whether Claimant sustained a subsequent, supervening or intervening injury discharging Employer/Carrier from further liability under the Act.

3. Whether Claimant is entitled to additional medical benefits pursuant to Section 7 of the Act.

4. Whether Claimant is entitled to his choice of physician.

5. The reasonableness and necessity of a recommended discogram.

6. Claimant's average weekly wage.

7. Entitlement to and authorization for medical care and services.

8. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was born on June 17, 1963, and was 40 years old at the formal hearing. He completed 12th grade, attained two years of "vo-tech" education, obtained a welding certificate and completed one year of junior college. Prior to working for Employer, he primarily worked as a welder, but also performed some work as a machinist. His prior occupations were with employers located in Mississippi, Arkansas, Louisiana, Kentucky, Alabama, Tennessee, Colorado, Washington, Georgia and Texas. In

the year prior to his job injury, Claimant primarily worked on "shutdowns," which are sporadic jobs involving preventative maintenance on refineries and power plants. (TR. 74-75, 88-93, 115-116; CX-12, pp. 1-4).

On December 13, 2000, Claimant was injured while working in a confined space at Employer's shipyard.[4] He experienced sharp pains in his neck and low back after twisting his body while performing overhead welding. He reported the injury and sought first-aid medical treatment at Employer's shipyard. He was provided some medication and returned to work with instructions to return for follow-up treatment if his symptoms persisted. On the following day, he returned to the first-aid clinic after experiencing "needles and burning and stuff [which] was still shooting down my arm." (Tr. 75-76).

Claimant was directed by Employer's "company doctor" to "West Jefferson Hospital," where he treated with Dr. McAlvanah, who restricted him from returning to work. After his symptoms did not improve, Claimant was referred by Dr. McAlvanah to Dr. Phillip Farris, who referred him to Dr. Robert Applebaum after his symptoms persisted. Dr. Applebaum treated Claimant twice and returned him to Dr. Farris. Claimant understood from Dr. Farris that he had a protruding disc. Claimant was not told that he had a right to choose his own physician. (Tr. 76-80, 100-108; CX-20, p. 43).

Dr. Farris did not tell Claimant that he was able to return to work, nor did anyone from Dr. Farris's office contact Claimant regarding his return to work. However, Claimant "found out several weeks later" that Dr. Farris released him to return to work without restrictions when he contacted Ms. Steph Judice. (Tr. 78, 102).

Claimant stated that he continued experiencing symptoms after his treatment with Dr. Farris. Although he continued to suffer from constant pain, he returned to work for several weeks with another employer, which terminated his employment. He then worked for Masse, despite ongoing and persistent pain, because

[4] Claimant testified he began working for Employer approximately five or six weeks prior to his December 13, 2000 injury. He earned a taxable hourly rate of $7.00, while he earned a per diem hourly rate of $11.00, which was not taxable, because he lived in excess of 75 miles from Employer's job. he was responsible for his own lodging because Employer did not provide room and board. (Tr. 86-87, CX-20, pp. 16-17, 36, 42).

he was financially "far behind." According to Claimant, his symptoms persisted through the formal hearing.[5] At his post-injury jobs, Claimant earned approximately $18.00 to $19.00 per hour. (Tr. 80-84, 86).

In December 2001, Claimant eventually began treating with Dr. McCloskey, who recommended nerve conduction studies and electromyography, which revealed "some slight nerve compression or something." Dr. McCloskey recommended a cervical discogram, which was never performed, and physical therapy, which Claimant underwent. Claimant recalled being told by Employer's representative that he was already under the care of a physician when he submitted a request to treat with Dr. McCloskey. (Tr. 85-86, 93-94, 103-107).

On cross-examination, Claimant acknowledged a Masse employment questionnaire indicating he did not consider himself handicapped. He stated that he "needed to go to work anywhere" because he "was hungry." He worked as a welder with Masse for approximately eight months from April 2002 through November 2002, when he earned $19.00 per hour; however, he was out of work for "a few days" following his July 2002 injury at Masse.[6] He explained that he was not allowed to return to work with Masse because Ms. Judice placed him on a "no rehire status" related to his prior injury. He worked as a welder for another employer, Global Explorer, for approximately four or five months at $17.00 per hour in Gulfport, Mississippi. He last worked with Global Manpower as a welder in April 2003, earning $17.00 per hour for one week in Pascagoula, Mississippi. (Tr. 94-98, 117-118; CX-12, p. 5; EX-3, p. 6; CX-20, pp. 19-22).

Claimant affirmed his deposition testimony that he earned "something under" $15,000.00 in the year 2000, which included his sporadic work with other employers. Likewise, he affirmed his deposition testimony that he could not recall what he earned in 2001, while he earned in excess of $15,000.00 in 2002. (Tr. 98-99; CX-20, pp. 38-42).

Claimant indicated that he was unable to comply with a subpoena request to retrieve his tax returns for recent years.

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[5] Notably, Claimant had to turn his entire body to turn his head while testifying at the formal hearing, and he was in obvious physical discomfort while sitting.

[6] Masse's records indicate Claimant started on May 20, 2002 and worked through November 7, 2002. (EX-3, pp. 4, 14).

The information was stored in a shed approximately "40 miles west of Oxford, Mississippi, . . . about a six-hour drive from here." He explained that his truck had a "cracked intake gasket" and that he did not have any other means of transportation to retrieve the information. (Tr. 98-100).

Claimant sought medical treatment from an emergency room following his nerve conduction study. He incurred medical services in the amount of $300.00, which has not been paid. He treated with another physician, Dr. Curtis Broussard, for respiratory complaints. He reported his other symptoms of pain in his back to Dr. Broussard, but could not afford to undergo X-ray examination or neurosurgical evaluation. He has been receiving medications from Dr. McCloskey bi-weekly for nearly two years for his pain. (Tr. 108-112).

Claimant noted that he would be willing to try to return to work if jobs could be found between New Orleans, Louisiana, and Pascagoula, Mississippi, if his truck could be repaired. (Tr. 112-113).

Steph Judice

Ms. Judice is Carrier's claims representative in this matter. She forwarded a letter requesting Claimant to sign a choice of physician form in favor of Drs. Applebaum and Farris, but Claimant did not sign the form. Rather, Ms. Judice received Claimant's choice of physician request in favor of treatment with Dr. McCloskey. (Tr. 43-45).

According to Ms. Judice, Claimant was involved in an accident with a subsequent employer, Masse, in July 2002. Her records relating to Claimant's December 2000 injury did not reveal if she spoke with Mr. Joby Broussard, Carrier's claims representative for Masse. Her records relating to Claimant's July 2002 injury include medical reports; however, Claimant did not file a claim in the July 2002 matter. Ms. Judice informed Mr. Broussard that Claimant sustained a prior accident but was provided a release to return to work without restrictions. (Tr. 45-55).

Ms. Judice indicated that she has no authority to hire or fire individuals, nor is she authorized to enforce policies not to hire certain former workers who are under a "no rehire" status. According to Ms. Judice, Claimant was laid off as part of a general layoff. At that time, he reported back complaints, which Ms. Judice found "very peculiar" because she understood

that Claimant had returned to work for a "couple of weeks" without physical complaints after his release to return to work without restrictions following his job injury. (Tr. 55-65).

Carla Seyler

On August 28, 2003, and on September 17, 2003, Ms. Seyler, a licensed Vocational Rehabilitation Counselor who was accepted as an expert in the field of vocational rehabilitation counseling, prepared job searches at Employer/Carrier's request. For each job search, Ms. Selyer was asked by Employer/Carrier to assume Claimant had no physical restrictions. She conceded reviewing Dr. Millette's medical records along with Claimant's FCE results and Dr. McCloskey's medical records in performing her first job search.[7] When she prepared her reports, she was unaware if Claimant returned to work for another employer. (Tr. 65-70, 119-120).

Although she understood Claimant lived "some place on the Gulf Coast of Mississippi," she found four welding jobs available to Claimant within an "expanded geographical area," including Duson, Louisiana, which is in western Louisiana, and Tampa Bay, Florida, at Employer/Carrier's request. Ms. Seyler was aware Claimant drove a 12-year-old truck which had "high mileage, and he said he 'hopes it's reliable,'" but was unaware of the automobile's mechanical functioning. She indicated that the jobs she identified were within the same geographical area as the work Claimant performed prior to working with Employer. If Claimant was offered any of the jobs in her reports, Ms. Seyler opined they would not be "appreciably different" than his work with Employer.[8] (TR. 70-73, 130-131; CX-25; EX-9, pp. 6-8).

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[7] In her August 2003 report, Ms. Seyler indicated that Claimant reported neck and back pain since his December 2000 job injury. She noted that Dr. McCloskey diagnosed Claimant with post-traumatic neck and low back syndromes with possible left ulnar distal latency, while Dr. Applebaum found no evidence of disease or damage involving Claimant's spinal cord or nerve roots. She indicated that her vocational report was based on the assumption that Claimant had no physical restrictions. (EX-9, pp. 1-3; CX-25).

[8] In both of her reports, Ms. Seyler did not identify the physical requirements of Claimant's prior welding job with Employer nor did she identify the physical requirements of the jobs potentially available to Claimant. However, she noted that Claimant was previously a welder, which was a "high semi-

Ms. Seyler explained that Halter Marine, an employer identified in her August 2003 report, was not currently hiring at the time of her report, but the employer "frequently" had openings.[9] However, welding jobs with three other employers, which were within one hour from Biloxi, Mississippi, were available and paid hourly wages between $12.00 and $20.00. She added that the employers identified in her September 2003 report were currently hiring.[10] Consequently, Ms. Seyler opined

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skilled" occupation, and that Claimant was experienced in fluxcore, stick and tig welding. (EX-9; CX-25).

[9] In her August 2003 report, Ms. Seyler identified four welding jobs: (1) Multi-Staffing Services of Gulfport, Mississippi, was hiring for a welding position paying between $12.00 and $14.00 per hour in Kiln, Mississippi; (2) Masse Contracting, of Gulfport, Mississippi, was hiring for fluxcore welding positions paying approximately $20.00 per hour with an additional $16.04 per diem pay rate in Mobile, Alabama; (3) Northrup Grumman was hiring for a welding position paying $16.92 per hour in Pascagoula, Mississippi; and (4) Halter Marine, of Pascagoula, Mississippi, was "anticipating" fluxcore welder openings paying between $15.00 and $16.00 per hour. (EX-9, pp. 4-5; CX-25).

[10] In her September 17, 2003 report in which she again assumed Claimant had no physical restrictions, Ms. Seyler identified the following welding positions: (1) Delta Personnel in Chalmette, Louisiana, was seeking a fluxcore and tig welder, who must pass a drug screen and undergo a "6G-Weld test," for a position paying $15.00 to $18.00 per hour; (2) Roclan Service and Supply, Inc., of Duson, Louisiana, was hiring for offshore welders with fluxcore, stick and tig welding experience who could pass a welding test to earn entry-level wages of $15.00 per hour (the job required applicants to work "three to seven days per week, twelve hour shifts or more"); (3) Tampa Bay Shipbuilding and Repair of Tampa, Florida, was seeking individuals to "apply in person" with a hardhat and tools to performing testing to fill welding positions in an unidentified "shipyard environment" (the company would pay $100.00 to applicants who complete an application, pass a drug test and complete testing, and would also pay $100.00 weekly to workers from Louisiana or Mississippi for the first twelve weeks of the job in addition to a regular pay rate of $12.30 to $15.50 per hour, based on ten-hour shifts); and (4) Allpax, of Covington, Louisiana employer was accepting applications for a tig welder position in Covington,

suitable alternative employment was available to Claimant since August 2003 and also since April 23, 2001, based on her experience in other matters and on the fact that Claimant obtained other employment following his job injury. (Tr. 122-126; 136-141).

The Medical Evidence

West Jefferson Center for Occupational Health

On December 14, 2000, Claimant presented at the West Jefferson Center for Occupational Health (WJCOH) with complaints of pain in the left trapezius and neck as well as left arm paresthesias following an incident in which he became caught in a hole and hurt his upper back while welding.[11] He was treated by Dr. Michael J. McAlvanah, who diagnosed a deltoid and trapezius strain on the left side and placed Claimant off work for two days. (EX-7, pp. 1-4).

On December 18, 2000, Claimant returned for follow-up treatment at WJCOH with Dr. McAlvanah, who prescribed medications and continued Claimant's off-work status for two more days due to Claimant's ongoing complaints of pain around his left trapezius and left arm, which also tingled. On December 20, 2000, when Claimant's symptoms did not abate, Dr. McAlvanah referred Claimant to Dr. Farris. (EX-7, pp. 5-7).

Philip R. Farris, M.D.

On October 29, 2003, the parties deposed Dr. Farris, who specializes in orthopedics. Dr. Farris has practiced in orthopedics for 17 years. (EX-15, pp. 4-5).

On December 20, 2000, Dr. Farris first treated Claimant upon the referral of Dr. McAlvanah. Claimant reported complaints of neck and left shoulder pain, which he described as a "pins and needles" sensation, with a radicular component into the left hand. Upon physical examination, Claimant's shoulder

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where a worker must pass a welding test to earn approximately $15.00 per hour, depending on experience. (CX-25, pp. 1-2; EX-9, pp. 6-8).

[11] On December 14, 2000, Ms. Judice transmitted Employer/Carrier's authorization for West Jefferson Center for Occupational Health (WJCOH) to treat Claimant. (EX-7, p. 1).

exam was "totally normal;" however, Dr. Farris found left-sided trapezial spasms and left-sided paracervical spasms. Otherwise, Claimant's neurological examination was normal, while X-rays exhibited negative results. (EX-4, p. 1; EX-15, pp. 5-8).

Dr. Farris diagnosed cervical strain, prescribed a Medrol Dose Pack, which is a descending dosage of cortisone, and Soma for muscle spasms. Because Claimant demonstrated muscle spasms, Dr. Farris restricted him from returning to his prior work, which Dr. Farris understood to be heavy duty labor, pending follow-up evaluation. Dr. Farris was unaware whether Claimant was previously restricted from returning to work. Id.

On December 26, 2000, Claimant returned for follow-up treatment, complaining that his medications were ineffective and that his symptoms persisted. Dr. Farris recommended an MRI to "rule out" a herniated cervical disc. He continued Claimant's restriction against returning to work, pending MRI evaluation. (EX-4, p. 2; EX-15, pp. 8-9).

On January 3, 2001, Claimant returned to Dr. Farris with results from a December 28, 2000 MRI. According to Dr. Farris, the MRI revealed a small, central focal disc protrusion at C3-4 resulting in mild thecal sac encroachment and cord impression. Dr. Farris recommended Claimant follow-up with Dr. Applebaum, a neurosurgeon to whom Dr. Farris would "totally" defer for interpretations of Claimant's MRI results and for opinions regarding the significance of bulging discs observed in Claimant's cervical area. He continued Claimant's medications and restriction against returning to work pending Dr. Applebaum's evaluation. (EX-4, pp. 3-5; EX-15, pp. 9-10, 12).

On March 28, 2001, Claimant returned to Dr. Farris after Dr. Applebaum prepared a March 19, 2001 report that Claimant's cervical MRI results revealed no evidence of neurological impairments and that Claimant could return to work. Upon physical examination, Dr. Farris found paracervical spasms, which were the only positive findings he made. Claimant was otherwise normal on physical examination. Dr. Farris diagnosed a neck strain and recommended a functional capacity evaluation (FCE). He continued Claimant's restriction against returning to work pending the results of the FCE. (EX-4, p. 6; EX-5, pp. 7-8; EX-15, pp. 11-14;).

Dr. Farris has not seen Claimant since March 28, 2001. He has not received any records of Claimant's subsequent treatment, and was unaware if Claimant underwent physical therapy. He

reviewed Claimant's FCE results at some point, but would defer to Dr. Bunch for an opinion whether Claimant's FCE results established Claimant could return to his prior occupation. Dr. Farris understood that discograms involved injecting dye into a disc; however, he noted he does not perform spine surgery and has never performed a discogram. (EX-15, pp. 11-16, 33).

On cross-examination, Dr. Farris indicated that he agreed with "whatever" Dr. Bunch reported in Claimant's FCE. He explained that it is "impossible" for him to render an opinion on whether or not he would release Claimant to return to his job as a welder because he does not "have any clue as to what a welder has to do." (EX-15, pp. 16-22).

Dr. Farris stated his office provided an office note releasing Claimant to return to work with "no" disability rating. He assumed his nurse wrote the note and stamped it with his signature. He would not disagree with his nurse's recommendations and does not need to see Claimant again because he expected that Dr. Applebaum "cleared" Claimant from a neurologic standpoint and because it would be "very unusual" for muscle spasms to last two years. He does not know if Claimant continues experiencing muscle spasms. (EX-4, p. 7; EX-15, pp. 22-26, 33-36).

Dr. Farris opined Claimant's muscle spasms were related to the December 3, 2000 job injury. He also opined Claimant's December 28, 2000 MRI results revealing "cord impression," which is "pretty much the same thing" "as cord compression," indicated Claimant should be evaluated by a neurosurgeon. He concluded Claimant reached maximum medical improvement on April 23, 2001 based on Claimant's FCE results and because Claimant never returned for examination. (EX-15, pp. 26-31, 34; CX-14, p. 43).

Dr. Farris was asked to assume Claimant continued demonstrating muscle spasms after March 28, 2001. He opined ongoing spasms would be "significant" because they would cause pain. According to Dr. Farris, cervical strains commonly cause muscle spasms, which usually last from four to six months and which occasionally last up to eight months. (EX-15, pp. 31-33).

Robert Applebaum, M.D.

On October 1, 2003, the parties deposed Dr. Applebaum, who is Board-certified in neurological surgery. He was accepted as an expert in the field of neurosurgery. (EX-16, pp. 5-6; CX-19).

At Employer's request, Dr. Applebaum evaluated Claimant on February 13, 2001. Claimant reported the following complaints which he related to a December 3, 2000 job injury when he was welding and became "wedged in a hole and twisted:" (1) complaints of neck pain with pain and numbness into the left arm; (2) headaches which were occasionally severe; and (3) occasional pain in both legs with a burning sensation in the low back. For his symptoms, Claimant was taking Vicodin, Soma and Celebrex. Claimant's MRI revealed a small disc protrusion at C3-4. (EX-5, pp. 1-4; EX-16, pp. 6-10).

Upon physical examination of Claimant's cervical area, Dr. Applebaum found no muscle spasms with marked limitation of motion, which "appeared to be voluntary in part." Claimant's lower back demonstrated normal range of motion, while his straight-leg raising test was positive on the left at 60 degrees. Examination of Claimant's muscles revealed marked weakness involving all left arm muscle groups; however, no pathological reflexes were noted. Dr. Applebaum prescribed no medications following his February 13, 2001 examination. (EX-5, pp. 1-4; EX-16, pp. 10-12).

Dr. Applebaum opined Claimant suffered from "minimal mechanical and equivocal neurological findings, as well as some equivocal mechanical findings." Because Claimant continued reporting symptoms, Dr. Applebaum recommended cervical and lumbar myelograms and CT scans to "rule out the possibility of a significant intraspinal problem." On March 1, 2001, Claimant underwent the recommended myelograms and CT scans, which revealed normal results with no evidence of ruptured discs or nerve irritations in the neck or low back. (EX-5, pp. 5-6; EX-16, pp. 12-13).

On March 19, 2001, Claimant returned to Dr. Applebaum for a follow-up evaluation at Employer's request. Claimant reported a history of cough, laryngitis and breathing difficulty in addition to his previously reported symptoms which were still symptomatic. He also reported pain in his right shoulder blade. He had not returned to Dr. Farris since Dr. Applebaum's February 13, 2001 evaluation, but continued taking his medications. (EX-5, pp. 7-8; EX-16, pp. 13-15).

Physical examination revealed similar findings to the February 2001 results, but Dr. Applebaum found slight limitation of motion, which was not demonstrated during the earlier evaluation. Straight-leg raising was positive bi-laterally,

although it was previously reported positive on the left side only. Claimant's left calf was one-fourth inch smaller on the left side, while the calves were previously equal in girth. Dr. Applebaum opined Claimant suffered from no neurological disease, injury or damage, and he did not know the etiology of Claimant's symptoms. Accordingly, he recommended a follow-up orthopedic evaluation by Dr. Farris. (EX-5, pp. 7-8; EX-16, pp. 15-16).

Dr. Applebaum was provided Claimant's March 11, 2002 EMG and nerve conduction study results, which revealed distal motor latency of the left arm. Otherwise, Dr. Applebaum noted the results were normal. He disagreed with a discogram recommendation because he opined discograms are unreliable and unnecessary. Dr. Applebaum opined Claimant was not neurologically restricted in any way from returning to work based upon results of his physical examinations of Claimant and in consideration of Claimant's medical reports and records, including the EMG and nerve conduction study results. He found no neurological reason Claimant could not return to his job as a welder; however, he did not report Claimant's former job requirements. (EX-16, pp. 16-19).

On cross-examination, Dr. Applebaum opined Claimant's December 3, 2000 job injury caused his symptoms, based on Claimant's history. He opined Claimant's straight-leg raising tests, which could indicate nerve irritation, low back pain or sprain and hip joint dysfunction, were consistent with some of his symptoms. Claimant's left arm weakness was an objective finding, but was not necessarily consistent with his symptoms. He opined Claimant's reports of pain and findings of weakness would probably indicate symptom exaggeration or malingering. (EX-16, pp. 19-22).

Dr. Applebaum generally agreed with the MRI findings of thecal sac encroachment and a disc protrusion at C3-4, but disagreed with the interpreter's cord impression diagnosis. He explained that he did not observe cord impression on the MRI and that the subsequent myelogram and CT scans did not show any significant bulging discs or spinal cord compression. Assuming the interpreting radiologist correctly diagnosed cord impression, which could result in paralysis upon aggravation, Dr. Applebaum would restrict Claimant from heavy lifting, prolonged bending and stooping and working with heavy equipment. He opined it would be unlikely that Claimant would aggravate his disc protrusion by performing moderate work lifting 20 to 30 pounds. (EX-16, pp. 22, 28-31, 37-40).

Assuming Claimant's MRI demonstrated positive cord impression and also that Claimant was symptomatic with supporting objective findings upon physical examination, Dr. Applebaum would recommend surgical intervention. Assuming Claimant's MRI demonstrated cord impression while Claimant was not symptomatic and without supporting objective findings, Dr. Applebaum would return Claimant to moderate duty, lifting between 20 to 30 pounds. (EX-16, pp. 31-33).

Dr. Applebaum explained that his opinion regarding the usefulness of discograms is shared by "many others," but not directly supported by research materials. Dr. Applebaum noted that Claimant demonstrated muscle spasms, which are an objective finding indicating a strain, sprain or "anything" which causes pain, in the cervical area on every visit with Dr. Farris. He opined bulging discs in the absence of other findings do not usually cause muscle spasm or pain. He agreed with Dr. Farris's opinion that Claimant reached maximum medical improvement on April 23, 2001. (EX-17, pp. 29, 33-37).

John McCloskey, M.D.

On December 18, 2001, Claimant treated with Dr. McCloskey at his attorney's request.[12] He reported a history of neck, left arm, and low back complaints following a December 2000 welding job injury in which he "twisted hard" after becoming wedged in a hole. He reported that "nothing very obvious was demonstrated" on objective testing "along the way" and that he did not receive

[12] On February 28, 2001, Ms. Judice sent Claimant a memorandum requesting Claimant's signature if he agreed to select Drs. Farris and Applebaum as his treating physicians. Attached to the memorandum was a "Free Choice of Physician" form designating only Dr. Applebaum as Claimant's choice of neurosurgeon. The form is neither signed nor dated by Claimant. (CX-22).

On July 17, 2001, Claimant completed a form identifying Dr. McCloskey as his choice of physician. On September 27, 2001 and October 25, 2001, his attorney forwarded copies of the July 2001 choice of physician form to Ms. Judice. (CX-30; CX-31).

On August 7, 2003, Claimant requested authorization for continuing treatment with Drs. McCloskey and Millette. On October 1, 2003, Claimant completed a "Choice of Physician" form in which he identified Drs. McCloskey and Millette as his choices of physicians. (CX-23; CX-26).

any physical therapy. He noted that he had currently returned to welding work, but was "struggling," and "hurting all the time." (CX-16, pp. 1, 6; EX-6, p. 1).

Upon physical examination, Dr. McCloskey noted Claimant guarded his left arm. He found some neck stiffness and left shoulder motion limitation. He reported a "markedly positive Tinel's sign at the left elbow, which causes paresthesias to radiate to the forefingers." His impression included post-traumatic cervical and low back syndromes and suspected left ulnar neuritis. He commented, "It's hard to explain the diffuse weakness of his left arm," but reported that Claimant exhibited "impressive" complaints. He recommended evaluation by physical therapist, Ruth Bosarge.[13] (CX-16, pp. 2,7; EX-6, p. 2).

On March 14, 2002, Dr. McCloskey informed Claimant that Ruth Bosarge, with whom Claimant began physical therapy on February 22, 2002, diagnosed a disc problem and recommended Dr. Laseter for a cervical discogram.[14] Dr. McCloskey reported that Claimant's nerve conduction studies indicated left arm ulnar nerve compression, which likely caused tingling and numbness in the left arm.[15] He anticipated arranging treatment with Dr.

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[13] On February 11, 2002, Claimant requested Employer/Carrier to authorize the administration of nerve conduction studies and physical therapy recommended by Dr. McCloskey. (CX-29).

[14] From February 22, 2002 through April 26, 2002, Claimant underwent physical therapy with physical therapist Ruth Bosarge, whose last report on April 26, 2002 indicates Claimant reached maximum medical benefit from physical therapy. She reported that Claimant continued suffering from neck and left upper extremity pain and paresthesias as well as cervical disc derangement causing symptoms into his left upper extremity. She also reported Carrier had not approved a cervical discogram and that it would "take more than [physical therapy] treatment" to successfully treat Claimant's cervical problem. (CX-16, pp. 3-4; CX-17; CX-21, p. 1; EX-6, pp. 8-10).

[15] On March 11, 2002, Dr. Millette reported nerve conduction study results indicating "mild delay of the left ulnar distal motor latency." No abnormalities were noted on electromyography. (CX-17; EX-6, p. 6).

Laseter.[16] (CX-16, p. 5; EX-6, p. 7).

Primary Care Medical Center, P.A.

On July 1, 2002, Claimant reported a low back injury sustained while working with scaffolding for Masse Contracting, Inc. On July 3, 2002, Claimant reported to Primary Care Medical Center, P.A., where he was examined and restricted from returning to work due to low back pain with muscle spasm. He was restricted from lifting more than 25 pounds, and limited to no more than 8 hours of bending, stooping and overhead work. He was also restricted from climbing, prolonged work in one position and working with machinery and power tools.

On July 5, 2002, Claimant returned for follow-up treatment. He reported a history of prior back and cervical pain. His restrictions were continued for approximately one week. On July 10, 2002, Claimant reported his back was "better" and that he was ready to go back to work. He was released to return to work without physical restrictions, but with the recommendation to "be careful." (EX-3, pp. 16-36).

The Vocational Evidence

Functional Capacity Evaluation

On April 5, 2001, Claimant underwent an FCE administered by Karmen Wolverton, P.T., and reviewed by Richard W. Bunch, Ph.D, P.T. Claimant's physical demand level could not be accurately defined due to inconsistent and submaximal effort with testing. However, Claimant demonstrated the ability to perform activities at a "light" physical demand level during the FCE. (CX-15, pp. 1-2; EX-8, pp. 1-2).

During the intake interview, which lasted 1.5 hours, Claimant was "noted to shift posture and stand to relieve pain." He guarded his cervical posture and appeared to be in distress. During the FCE, he demonstrated self-limited cervical extension and lumbar flexion. He was unwilling or unable to tolerate frequent or prolonged postures, including crouching and stooping, except on an occasional basis. His ability to return to his prior job could not be determined due to non-organic

[16] On September 26, 2003, Claimant's attorney requested counsel for Employer/Carrier to authorize treatment with a pain management specialist recommended by Dr. McCloskey. (CX-24).

signs and submaximal effort.[17] Claimant's "sincerity of effort, or the degree [to] which conscious behavior is directed at controlling the outcomes of this FCE, are beyond the scope of this examination." (CX-15, pp. 2-3, 7; EX-8, pp. 2-3, 7).

Employer's Personnel Records

On September 29, 2000, Claimant submitted an application for employment with Employer. On November 7, 2000, Claimant completed an "Applicant Processing Form" and was issued an orientation card for employment. From the week ending November 12, 2000 through the week ending December 17, 2000, Claimant earned a total of $3,387.60, which represents 6 payments including regular pay and per diem pay: (1) $639.00 for the week ending November 12, 2000; (2) $675.00 for the week ending November 19, 2000; (3) $396.00 for the week ending November 26, 2000; (4) $720.00 for the week ending December 3, 2000; (5) $561.60 for the week ending December 10, 2000; and (6) $396.00 for the week ending December 17, 2000. ($639.00 + $675.00 + $396.00 + $720.00 + $561.60 + $396.00 = $3,387.60). A January 8, 2001 personnel change authorization indicates Claimant was discharged on January 5, 2001 due to absenteeism, but a handwritten entry in the document indicates, "OK Rehire." (EX-2, pp. 8-18, 22-27).[18]

In the weeks preceding his injury, Claimant earned regular pay in the total amount of $1,317.40, which is exclusive of per

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[17] The physical requirements of Claimant's job were not reported; however, it was noted that information about his job as a welder was derived by interview and the Dictionary of Occupational Titles, 1997, 4th edition. Claimant's job was estimated as "medium to heavy." Claimant reported, "I've been [welding] for over 20 years and it's all I know. As of right now with my neck and everything, I doubt I can. I still feel like something is drawn up on my left side. I just don't think I can keep the shield and helmet on. It's really hard work." He added that he was "tired of being broker [sic] than a convict . . . I haven't had much money." (CX-15, p. 7; EX-8, pp. 3, 7).

[18] Employer's personnel records include unidentified check details for September 26 and 27, 2000, which predate Claimant's application with Employer and which indicate Claimant earned $143.50 for 20.50 hours of work. Employer's records include employment information from another employer, "The Industrial Company," for the period ending April 15, 2000, when Claimant's year-to-date earnings were $2,070.00. (EX-2, pp. 21, 28).

diem pay and which represents the following: (1) $248.50 for the week ending November 12, 2000; (2) $262.50 for the week ending November 19, 2000; (3) $154.00 for the week ending November 26, 2000; (4) $280.00 for the week ending December 3, 2000; (5) $218.40 for the week ending December 10, 2000; and (6) $154.00 for the week ending December 17, 2000 ($248.50 + $262.50 + $154.00 + $280.00 + $218.40 + $154.00 = $1,317.40). (EX-2, pp. 22-27).

Other Evidence

Claimant submitted a "Mileage Reimbursement Form" for the period of time from December 5, 2001 through May 7, 2002. He reported driving round-trip distances to the following providers: (1) Dr. McCloskey (68.6 miles); (2) Dr. McCloskey and "RX" (69.8 miles); (3) "RX" (multiple trips for a total of 254.40 miles); (4) vocational rehabilitation at his attorney's office (32 miles); (5) Ruth Bosarge, P.T. (multiple trips for a total of 823.20 miles); and (6) Dr. Millette (68.6 miles). Accordingly, Claimant reported driving a total of 1,316.60 miles (68.6 + 69.8 + 254.40 + 32 + 823.20 + 68.6 = 1,316.60). (CX-21, p. 2).

The Contentions of the Parties

Claimant contends that he sustained compensable injuries to his neck and back on December 13, 2000, while welding in a confined area for Employer. He seeks compensation and medical benefits.

Claimant argues his average weekly wage should be calculated under Section 10(c) of the Act by dividing $3,132.99, his total pre-injury earnings with Employer, by six, the number of weeks he worked for Employer pre-injury, resulting in an average weekly wage of $639.01. He earned $7.00 per hour taxable wages and $11.00 hourly non-taxable per diem payments, which he argues should be included in his wages because the per diem was paid directly to him to defray lodging.

Claimant argues his disability status is temporary total because he never reached maximum medical improvement, noting that Dr. McCloskey recommended a discogram, which was not authorized by Employer/Carrier. He contends Dr. McCloskey is his choice of physician.

Employer/Carrier argue Claimant was released to return to his prior occupation without restrictions by Drs. Applebaum and

Farris. Further, they aver Claimant returned to work at welding jobs at the same or greater pay than his pre-injury job, which establishes Claimant could return to his prior occupation and that he sustained no loss in earning capacity. Further, they argue suitable alternative employment was available to Claimant pursuant to the reports of vocational expert Seyler.

Alternatively, Employer/Carrier argue Claimant's July 2002 low back injury with Masse constitutes an intervening cause which terminates their ongoing liability for Claimant's compensable injury. They also contend that Claimant chose to treat with Drs. McAlvanah, Farris and Applebaum even though Claimant completed no choice of physician form designating the physicians as his treating physicians.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Adverse Inference

Claimant argues he should not suffer from an adverse inference because his attorney received Employer/Carrier's subpoena requesting Claimant's tax returns in early October

2003, approximately 5.5 weeks prior to the hearing. Claimant's counsel concedes Employer/Carrier originally requested the materials on July 15, 2003, but notes that Claimant responded "during the month of September [2003]" that he did not possess the information. Claimant alternatively argues he responded timely with authorizations for appropriate government agencies to release his information.

Claimant's argument overlooks his August 7, 2003 deposition testimony in which he clearly and unequivocally indicated he possessed the information and should be able to provide it upon Employer/Carrier's request. (CX-20, pp. 41-42). His argument does not address Employer/Carrier's October 9, 2003 Motion to Compel production of the requested information, which was sought by subpoena and by Employer/Carrier's original discovery requests. Further, his argument ignores his burden of production in the instant matter. See Greenwich Collieries, supra. Accordingly, I find Claimant's argument that an adverse inference should not be invoked under these circumstances is without merit.

B. Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

I found Claimant generally impressive as a witness in terms of confidence, forthrightness and overall bearing on the witness stand, which supports his demeanor and believability. His testimony was generally unequivocal and credible, and I did not observe any deliberate efforts at deception or dishonesty. He was in obvious discomfort at the formal hearing and was limited in his ability to move his neck, which is generally consistent with Dr. McCloskey's report that Claimant's complaints were "impressive" and with entries in Claimant's FCE report indicating Claimant guarded his cervical posture, appeared to be in distress and was "noted to shift posture and stand to relieve pain" during his 1.5-hour intake interview. Further, Claimant's left arm complaints find objective support in his nerve

conduction studies, according to Dr. McCloskey. Accordingly, I was favorably impressed with Claimant's testimony.

Employer/Carrier contend the accuracy of Claimant's testimony that he was unable to return to work without pain is belied by his indication on a September 27, 2001 pre-employment application with Masse that he did not consider himself to be handicapped. I find Employer/Carrier's argument without merit. In Kubin, supra, the Board rejected an employer's argument that a claimant's complaints of pain were not credible because he was not honest on employment applications with subsequent employers. The Board found that the administrative law judge acted within his discretion in accepting the claimant's testimony, noting that the claimant explained his apprehension of reporting a back injury which might adversely affect his chances of employment. Kubin, 29 BRBS at 120, 120 n. 2.

Presently, Claimant testified at the hearing that he needed to return to work despite pain because he was "hungry" and because he was financially challenged. His testimony is consistent with his deposition testimony and his FCE report. Further, Claimant testified about his perception that the occurrences of his job injuries resulted in his "no rehire" status among some employers, implying Claimant might plausibly be apprehensive of reporting his disability status on subsequent employment applications.

Alternatively, it is noted that the Masse employment application asks only whether Claimant considers himself "handicapped," without further explanation. I find Claimant's check-the-box negative response fails to establish he experienced no ongoing symptoms related to his December 13, 2000 injury with Employer. Accordingly, I find Claimant's entry on Masse's employment application does not detract from his overall credibility.

Lastly, Employer/Carrier contend Claimant's complaints of pain are not credible because his FCE results demonstrate that he was "malingering." I find their argument specious and without merit. While the FCE report indicated Claimant's ability to return to his prior job could not be determined due to non-organic signs and submaximal effort, his "sincerity of effort, or the degree which conscious behavior is directed at controlling the outcomes of this FCE," were "beyond the scope of this examination." Consequently, I find Employer/Carrier's argument in reliance upon the FCE results that Claimant was malingering are without factual support. Accordingly, I find

the FCE results, which noted that Claimant was "unwilling or unable to tolerate frequent or prolonged postures, including crouching and stooping, except on an occasional basis," do not diminish Claimant's credibility.

C. Intervening Cause

Employer/Carrier argue Claimant's July 2002 low back injury on the job with another employer, Masse, was an "intervening cause" extinguishing its liability for ongoing compensation and medical benefits. Notably, Masse is not a party in this matter. Claimant argues the July 2002 incident temporarily affected his low back only, while the instant matter primarily involves his cervical and arm complaints.

If there has been a **subsequent non-work-related injury or aggravation**, the employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (CRT) (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Cyr v. Crescent Wharf & Warehouse Co., supra; Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); Marsala v. Triple A South, 14 BRBS 39, 42 (1981); See also Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987).

Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer liable for benefits for the entire disability. Plappert v. Marine Corps. Exchange, 31 BRBS 13, 15 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994); Merrill, 25 BRBS at 144-145; Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981).

Moreover, if there has been a subsequent non work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

The Fifth Circuit has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n, which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the court in Mississippi Coast Marine v. Bosarge held that a simple "worsening" could give rise to a supervening cause. 637 F.2d 994, 1000 (5th Cir. 1981). Specifically, the court held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." Id.

In the present matter, there is no allegation nor any evidence that Claimant's work-related December 2000 injuries caused Claimant's July 2002 scaffolding accident. Accordingly, I find Claimant's July 2002 back injury was not the natural or unavoidable result of Claimant's work-related December 2000 injuries. Thus, the second injury may constitute an intervening cause of a subsequent injury occurring outside of Claimant's work with Employer to relieve Employer's liability for the subsequent injuries.

However, the scant medical evidence of record fails to establish Claimant's July 2002 injury worsened or otherwise overpowered and nullified his original job injury. At most, it appears from Claimant's July 2002 treatment that he sustained a temporary exacerbation of his underlying condition which generally resolved within a few days. The July 10, 2002 recommendation for Claimant to "be careful" fails to establish the extent, if any, to which his July 2002 injury caused his disability. As noted by Claimant, the thrust of the instant matter involves his cervical and left arm complaints, while the July 2002 injury appears to have involved only a low back complaint. Otherwise, there is no evidence of record which apportions the disability between Claimant's two injuries, and I

find it is appropriate to hold employer liable for benefits for Claimant's entire disability.

D. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

E. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Since Claimant first underwent medical treatment for his condition following his job injury, he was restricted from returning to work by Drs. McAlvanah and Farris. I find Dr. Farris's opinions that Claimant reached maximum medical improvement and could return to work without restrictions on April 23, 2001 are not well-reasoned. His opinions rely in part upon an April 23, 2001 office note which is not persuasive in establishing Claimant could return to work without restrictions.

Dr. Farris, who restricted Claimant during the entirety of his treatment and who last restricted Claimant from working pending the FCE results, "assumed" his nurse prepared the note. However, the qualifications and experience of Dr. Farris's nurse are not of record, nor is there any evidence establishing the nurse understood the physical requirements of Claimant's prior occupation or evaluated Claimant and his FCE results before providing the release, if in fact his nurse actually prepared the note. Claimant's testimony indicates Dr. Farris's office never contacted him regarding the issuance of a work release, which further undermines the reliability of the office note in establishing Claimant's ability to return to his prior occupation.

I find Dr. Farris's candid admissions that he never saw Claimant again after his March 28, 2001 visit and that he was unaware if Claimant was symptomatic beyond the March 28, 2001 visit diminishes his reliance on his nurse's April 23, 2001 office note. Likewise, I find Dr. Farris's admission that ongoing symptoms of pain beyond March 28, 2001 would be "significant" attenuates his opinion that Claimant could return to work without restrictions in consideration of Claimant's credible complaints of ongoing pain, which were documented by Dr. McCloskey and physical therapist Bosarge, after March 28, 2001.

Moreover, I find Dr. Farris's opinion that Claimant reached maximum medical improvement on April 23, 2001 based on the FCE results and on Claimant's failure to return to his office is not well reasoned in consideration of the FCE results, which indicated Claimant was "unwilling or unable to tolerate frequent or prolonged postures, including crouching and stooping, except on an occasional basis," and based on subsequent medical and physical therapy records establishing ongoing symptoms of which Dr. Farris was unaware.

Likewise, I find Dr. Farris's opinion that he would not disagree with his nurse's office note because he expected that Dr. Applebaum "cleared" claimant from a neurological standpoint and because it would be very unusual for muscle spasms to persist is not persuasive in consideration of subsequent medical and physical therapy records establishing other ongoing symptoms, including left arm complaints, which Claimant consistently reported to every physician since his December 18, 2000 visit with Dr. McAlvanah and which were objectively confirmed by Claimant's March 11, 2002 nerve conduction studies, according to Dr. McCloskey's March 14, 2002 opinion.

Lastly, I find Dr. Farris's opinion that Claimant was released on April 23, 2001 to return to work without restrictions is not persuasive in consideration of his concession elsewhere that it would be "impossible" for him to render a conclusion on whether or not Claimant could return to welding because Dr. Farris does not have "any clue as to what a welder has to do." Moreover, I find any opinion Dr. Farris has regarding Claimant's FCE is belied by his complete deference to the opinions of Dr. Bunch, who specifically reported that Claimant's ability to return to his prior occupation was not established by the FCE results and that Claimant's sincerity of effort was beyond the scope of the FCE.

I find Dr. Applebaum's opinions that Claimant is not neurologically restricted from returning to work and that there is no neurological reason Claimant cannot return to his job as a welder are not persuasive in establishing Claimant was asymptomatic and could return to his job as a welder. Notably, Dr. Applebaum, who related Claimant's symptoms to his job injury with Employer, failed to describe the physical requirements of Claimant's welding job, which occludes his opinion that Claimant could return to his prior occupation without restrictions.

Dr. Applebaum's opinions that he could not explain the etiology of Claimant's symptoms and that Claimant may have been exaggerating symptoms or malingering implicitly indicates Claimant was complaining of symptoms during treatment. I find Dr. Applebaum's opinion elsewhere that Claimant actually demonstrated symptoms and certain objective findings, including straight-leg raising tests which were observed on both dates he examined Claimant and which he opined were consistent with some of Claimant's symptoms, detracts from his opinions that Claimant was not restricted from returning to work without any physical restrictions.

I find Dr. Applebaum's agreement with Dr. Farris's opinion that Claimant reached maximum medical improvement on April 23, 2001 flawed because, as noted above, Dr. Farris restricted Claimant from returning to work pending the FCE results which reportedly could not establish Claimant's ability to return to his prior occupation. Like Dr. Farris, Dr. Applebaum never treated Claimant or re-evaluated his condition prior to the issuance of the work release over one month later at a time when Claimant's credible testimony indicates he remained symptomatic. Accordingly, I find Dr. Applebaum's opinion that Claimant reached maximum medical improvement on April 23, 2001 is not

persuasive.

Conversely, Claimant credibly indicated he remained symptomatic following treatment by Drs. Farris and Applebaum. His testimony is buttressed with findings reported by Drs. McCloskey and Millette as well as by physical therapist Bosarge. Of the witnesses of record, I find Claimant is in the best position to understand the physical job requirements of his prior job with Employer. He credibly testified that he is unable to return to his regular or usual employment, which included overhead work he was performing at the time of injury, due to his work-related injury. Accordingly, I find Claimant established a **prima facie** case of total disability.

In consideration of the foregoing, I find the record fails to establish Claimant reached maximum medical improvement from his job injury on April 23, 2001 or that he could return to work without physical restrictions. Moreover, it is noted that Claimant's choice of physician, determined below to be Dr. McCloskey, recommended additional diagnostic testing to determine Claimant's future course of treatment. Consequently, I find Claimant has not reached maximum medical improvement, and his disability status is temporary for all periods of post-injury disability.

December 13, 2000 through April 22, 2001

Claimant was restricted by his work-related complaints from returning to any work pursuant to the opinions of Drs. McAlvanah and Farris. His disability status from December 13, 2000 through April 22, 2001 is considered temporary total, based on his average weekly wage of $256.30, as determined below.

April 23, 2001 through April 30, 2003

As noted above, Claimant's April 23, 2001 release to return to work without restrictions by Dr. Farris's office fails to establish Claimant could return to his prior occupation without physical restrictions. As discussed below, Claimant's sporadic return to post-injury employment fails to establish suitable alternative employment was reasonably available to him within his physical restrictions and limitations. However, his failure to produce tax returns in compliance with a subpoena request and motion to compel production results in an adverse inference that his earnings information would establish that his post-injury earnings were as much or more than his pre-injury earnings with Employer.

Claimant unequivocally testified that he earned more in 2002 than he did in 2000, while he could not recall what he earned in 2001. However, he indicated he last worked in April 2003. Accordingly, I find Claimant failed to establish a loss of wage-earning capacity from April 23, 2001 through April 30, 2003, and he is not entitled to disability benefits under the Act.

May 1, 2003 through Present and Continuing

Claimant has not returned to work since his last employment in April 2003, and he credibly indicated his symptoms have persisted through the present. Accordingly, Claimant's disability status is considered temporary total from May 1, 2003 through present and continuing, based on his average weekly wage of $256.30, as determined below.

F. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

No requirement exists that a claimant be bedridden to be totally disabled. Watson v. Gulf Stevedore Corp., 400 F.2d 649

(5th Cir. 1968). The fact that the claimant works after his injury does not necessarily preclude a finding of total disability. Haughton Elevator Co. v. Lewis, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978).

Facts supporting total disability for a working claimant involve "extraordinary effort," where the claimant continues employment due to an extraordinary effort and in spite of excruciating pain and diminished strength. Haughton Elevator Co., supra. See also Richardson v. Safeway Stores, 14 BRBS 855, 857-58 (1982); Holmes v. Tampa Ship Repair & Dry Dock Co., 8 BRBS 455 (1978); Steele v. Associated Banning Co., 7 BRBS 501, 509 (1978).

The fact that Claimant had a short-term job post-injury does not establish that he is not now totally disabled, unless the employer shows that the post-injury job is currently available. See Carter v. General Elevator Co., 14 BRBS 90, 97 (1981); Jarrell v. Newport News Shipbuilding & Dry Dock Co., 9 BRBS 734, 740 (1978). Sporadic post-injury work also does not rule out permanent total disability. Seals v. Ingalls Shipbuilding, Div. of Litton Sys., 8 BRBS 182, 184 (1978); Moore v. Newport News Shipbuilding & Dry Dock Co., 7 BRBS 1024, 1027 (1978) (a claimant who fished to support his family was held not to have shown thereby that fishing was suitable alternate employment, as the job was seasonal, his ex-employer did not establish the pay scale for it, and he worked only out of necessity).

Ms. Seyler relied on Employer/Carrier's assumption that Claimant was not physically restricted when she identified potential jobs in locations as far away from Claimant's Biloxi, Mississippi residence as Duson, Louisiana, and Tampa Bay, Florida. See Turner, supra at 1042-43 (specifying that the employer must show jobs which are available within the claimant's **"local community"**); Kilsby v. Diamond M. Drilling Co., 6 BRBS 114 (1977) (the Board held that jobs 65 and 200 miles away are **not** within the geographical area, even if the employee took such jobs before his injury). None of the job descriptions describe **any** physical requirements, including overhead work, stooping or crouching, or otherwise describe the **precise nature and terms** of the job opportunities purportedly constituting suitable alternative employment. Accordingly, the job descriptions, which include jobs in excess of 65 miles from Claimant's geographical area, do not allow the undersigned to rationally determine whether Claimant is physically and mentally capable of performing the work and that it is realistically

available.

At the hearing, Claimant demonstrated limited range of motion and discomfort during prolonged sitting while testifying, which is generally consistent with Dr. McCloskey's comments that Claimant's complaints were "impressive" and with the FCE findings indicating Claimant was "unwilling or unable to tolerate frequent or prolonged postures, including crouching and stooping, except on an occasional basis." Ms. Seyler reviewed Claimant's medical records describing a problematic left arm and cervical area, but "assumed" Claimant had no physical restrictions in response to Employer/Carrier's request. I find the positions she identified fail to establish Claimant is physically capable of performing the work and that such positions were realistically available to him.

Alternatively, Employer/Carrier contend Claimant's return to post-injury welding employment, which at one point lasted for as little as one week, establishes suitable alternative employment was available to Claimant within his physical restrictions. Claimant testified that he returned to post-injury employment, despite ongoing and disabling pain, because he was "hungry" and because he was financially challenged. It is undisputed that Claimant's compensation benefits were terminated prior to his attempts to return to post-injury work, which supports a finding that Claimant returned to work despite ongoing and disabling pain only out of necessity.

Likewise, it is undisputed that Claimant has been receiving bi-weekly pain medication prescriptions since he began treating with Dr. McCloskey, which supports a finding that Claimant returned to his post-injury employment since treating with Dr. McCloskey despite ongoing and disabling pain only through necessity and the use of prescription pain medications. Consequently, I find Employer/Carrier's argument that Claimant's post-injury employment establishes the availability of suitable alternative employment without merit.

In light of the foregoing, I find Employer/Carrier failed to identify suitable alternative employment.

G. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation

methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

Claimant worked as a welder for only 5.14 weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b).[19] See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). Cf. Duncan v. Washington

[19] Claimant worked from November 7, 2000 through December 13, 2000, a period of 36 days, or 5.14 weeks (36 days ÷ 7 days per week = 5.14 weeks).

Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act can not be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

Claimant argues his earnings should include his $11.00 "hourly" per diem because he was responsible for his room and board while working more than 75 miles from his home to perform his job for Employer. Section 2(13) of the Act defines wages as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which

> is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954.

33 U.S.C. § 902(13). The Internal Revenue Code excludes the value of meals and lodging as gross income under 26 U.S.C. § 119. 26 U.S.C. 119 (2004). The Fifth and Ninth Circuits have found that the plain language of the Act excludes such compensation because meals and lodging do not fall within the Section 119 criteria of the Internal Revenue Code. See H.B. Zachry Company v. Quinones, 206 F.3d 474 (5th Cir. 2000) (Section 902(13) is clear on its face. It provides that 'wages' equals monetary compensation plus taxable advantages); Wausau Insurance Companies v. Director, OWCP [Guthrie], 114 F.3d 120 (9th Cir. 1997); Cf. Custom Ship Interiors v. Roberts, 300 F.3d 510 (4th Cir. 2002), cert. denied, 123 S.Ct. 1255 (2003) (regular per diem payments to employees, made with the employer's knowledge that the employee was incurring no food or lodging expenses requiring reimbursement, were "disguised wages" which were includable as "wages" under the LHWCA).

In the instant matter, Claimant did not receive meals and lodging at Employer's premises. However, he received a monetary amount which was provided with the understanding he would seek room and board at a local hotel and which was purportedly not taxable as wages. In McNutt v. Benefits Review Board, the Ninth Circuit considered a similar situation in which a claimant did not receive meals and lodging from the employer, but instead received money that was not taxable from his employer to pay for his own food and lodging. The Ninth Circuit found the per diem arrangement was not a "wage" under Section 2(13) of the Act, because, as the parties in the matter agreed, it was not subject to withholding under the Internal Revenue Code. Accordingly, consistent with its opinion in Wausau, supra, the Ninth Circuit held that the claimant's per diem was not includable as wages for purposes of determining his benefits under Section 2(13) of the Act. 140 F.3d 1247 (9th Cir. 1998).

Likewise, the parties in the instant matter agree that Claimant's $11.00 hourly per diem was not taxable. While it is arguably unusual that a "per diem" for room and board is calculated on an "hourly" basis, there is no evidence establishing Claimant's $11.00 hourly per diem was subject to withholding under the Internal Revenue Code. As noted above, Claimant failed to comply with a subpoena request for his tax returns, which could verify whether his "hourly" per diem was subject to withholding and which could establish the "per diem"

was a "disguised wage." Employer's personnel records do not indicate whether his per diem payments were subject to withholding. Accordingly, I find the per diem arrangement is not a "wage" under Section 2(13) of the Act, because, as the parties in this matter agree, it was not taxable. Consequently, I find Claimant's per diem for room and board should be excluded for the purposes of calculating his average weekly wage under the Act.

Claimant next argues his average weekly wage should amount to his total pre-injury earnings with Employer in the year prior to his injury divided by the number of weeks he worked with Employer. On the other hand, Employer/Carrier note that Claimant testified that he earned less than $15,000.00 in 2000 and argue Claimant's average weekly wage should be $280.00, which represents Claimant's $7.00 hourly rate, based on a 40-hour week. Employer/Carrier further argue that an average weekly wage greater than $280.00 would result in an excessive award to Claimant because Claimant's employment was sporadic in the year prior to his injury.

Without Claimant's tax returns, which have caused an adverse inference to be invoked against Claimant, I find the best approximation of Claimant's average weekly wage may be determined based on his actual earnings received from Employer in the 5.14 weeks he worked for Employer prior to his injury. find an average weekly wage determination based on Claimant's speculation that he earned "something under" $15,000.00 cannot be reasonably obtained. I find Employer's approximation based on a 40-hour week precludes the likelihood that Claimant could receive overtime pay. Accordingly, I find Claimant's average weekly wage at the time of his job injury may reasonably be determined to be $256.30, which represents his total pre-injury earnings with employer divided by the number of weeks he worked for Employer pre-injury. ($1,317.40 ÷ 5.14 weeks = $256.30 per week).

H. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co.,

15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

1. Claimant's Choice of Physician

According to Section 7(b) of the Act, Claimant "shall have the right to choose an attending physician." 33 U.S.C. § 907(b). Claimant argues that he is entitled to receive medical treatment from Dr. McCloskey, who is his choice of treating physician and who referred him to physical therapist Bosarge, Dr. Millette and Dr. Laseter. Employer/Carrier do not dispute that Claimant was referred to Dr. McAlvanah by Employer; however, they contend that Claimant, by his implicit acquiescence to continue treating with Dr. McAlvanah and such physicians, selected Dr. McAlvanah and subsequent referrals to Drs. Farris and Applebaum, relying on Todd Shipyards, Inc. v. Frayley, 592 F.2d 805 (5th Cir. 1979) and on two administrative law judge opinions, Boone v. Newport News Shipbuilding and Dry Dock Co., 1999 WL 814316, 1998-LHC-0803 (1999), and Jordan v. Stevedoring Services of America, 2000 WL 679272, 1999-LHC-2854 (2000).

I find the matters on which Employer/Carrier rely are inapposite to the instant proceeding. In Todd Shipyards, Inc., the Fifth Circuit specifically stated:

> [The employer] cannot be entirely faulted in the harsh manner advocated by the Administrative Law Judge. Five different doctors, whose credentials have not been questioned, examined [the claimant] and were either unable to find a problem with his vision or to prescribe a solution to a problem which they did find. This does not seem to be a case in which a company doctor performs a perfunctory, superficial examination and then concludes that the worker is malingering and can return to work. The statutory requirement that the employer furnish such medical treatment "for such period as the nature of the injury or the process of recovery may require," 33 U.S.C. s 907(a), simply cannot mean that an employer is required to send a worker who claims to be injured to every qualified doctor who can be found when a succession of doctors fails to find a medical problem.

592 F.2d at 812-813.

Unlike the facts presented in Todd Shipyards, Inc., all of the physicians who observed Claimant's MRI agree there are objective findings, including a protruding disc at C2-3, for which Dr. McCloskey recommends a cervical discogram and possible pain management. All of the physicians who treated Claimant reported Claimant's symptoms, although they may have disagreed whether the magnitude of symptoms correlated to the objective findings revealed in his diagnostic studies.

Although the FCE results could not establish Claimant's ability to return to work due to non-organic behavior, it was reported that Claimant was unwilling or unable to tolerate certain postures, which is generally consistent with Dr. McCloskey's findings supporting his recommendation for physical therapy. Drs. McCloskey and Applebaum agree Claimant's nerve conduction study indicates left arm distal motor latency, which Dr. McCloskey opined is responsible for Claimant's left arm complaints. Accordingly, the facts of this matter do not establish that "a succession of doctors failed to find a medical problem."

I find this matter is similar to "a case in which a company doctor performs a perfunctory, superficial examination and then concludes that the worker is malingering and can return to work" insofar as Dr. Farris's nurse purportedly provided Employer/Carrier with a release for Claimant to return to unrestricted work **apparently without any evaluation of Claimant or opinion from Dr. Farris**, who previously restricted Claimant from returning to any work pending FCE results.

As noted above there is no indication Dr. Farris's nurse was qualified to review Claimant's FCE results or otherwise determine whether Claimant could return to his prior occupation. Likewise, as previously stated, Dr. Farris's complete deference to Dr. Bunch's FCE report undermines any opinion Dr. Farris has regarding Claimant's FCE and his ability to return to work because Dr. Bunch explicitly indicated that Claimant's return to work could not be established based on his FCE performance. Moreover, I find Dr. Farris's office note releasing Claimant without evaluating him or otherwise informing him he was being released without restrictions while he was symptomatic is arguably not reasonable medical care.

The other matters on which Employer/Carrier rely are not binding authority on the undersigned. However, it is noted that those matters are not helpful in establishing Drs. McAlvanah, Farris or Applebaum as Claimant's choices of physicians. The

claimant in Boone was considered to have chosen a physician through his implicit acquiescence established by treating with the physician without objection for **2.5 years**, which is considerably longer than the few months Claimant treated with Drs. McAlvanah, Farris and Applebaum. Boone, supra at 7-8. In Jordan, supra, the claimant signed an employer's choice of physician form in favor of a physician after the claimant had seen the physician and reported his satisfaction with the physician's medical treatment. In the instant matter, Claimant never signed Employer's choice of physician form. Instead, he sought to treat with his own physician when he became aware of his right to choose his own physician and after Dr. Farris's office issued his release to return to work without evaluating him or otherwise informing him of its decision to release him without restrictions. Consequently, I find Employer/Carrier's reliance upon the administrative law judge opinions in Boone, supra, and Jordan, supra, misplaced.

Accordingly, pursuant to the statutory requirements that Claimant is entitled to treatment by his choice of physician and that Employer must furnish such medical treatment "for such period as the nature of the injury or the process of recovery may require," I find Claimant is entitled to treatment with his choice of physician, Dr. McCloskey, who subsequently referred him to physical therapist Bosarge, Dr. Millette and Dr. Laseter, for his credible complaints of pain and objective findings on diagnostic studies.

2. The Reasonableness of a Recommended Discogram

Of the record physicians, I find the opinions of the neurosurgeons regarding the usefulness of a recommended discogram more persuasive and reliable because Dr. Farris, an orthopedic specialist, conceded he does not perform spinal surgery and has never performed a discogram. The two neurosurgeons disagree over the usefulness of discograms.

Of the neurosurgeons, only Dr. Applebaum was deposed and subject to cross-examination. Although he indicated his opinion that discograms are not useful diagnostic tools is not shared by the entirety of the medical community or directly supported by research materials, his explanation for his opinion is not unreasonable. Dr. Applebaum's opinion was not challenged by any opposing explanation by Dr. McCloskey, whose opinion that Claimant's recommended discogram is necessary and reasonable for the treatment of Claimant's job injury may only be inferred by Dr. McCloskey's recommendation for the procedure. Accordingly,

I find Claimant failed to submit adequate evidence establishing the recommended discogram is reasonable and necessary for the treatment of his compensable injury.

3. Claimant's Travel Expenses

Costs incurred for transportation for medical purposes are recoverable under Section 7(a). Tough v. General Dynamics Corporation, 22 BRBS 356 (1989); Day v. Ship Shape Maintenance Co., 16 BRBS 38 (1983); Gilliam v. The Western Union Telegraph Co., 8 BRBS 278 (1978). Parking fees and tolls incurred while traveling to or attending medical appointments may also be reimbursed. Castagna v. Sears, Roebuck & Co., 4 BRBS 559 (1976), aff'd mem., 589 F.2d 1115 (D.C. Cir. 1978); See also Nides v. 1789, Inc., (BRB No. 99-0162)(Oct. 18, 1999)(Unpub.) (when an employer does not challenge a claimant's credibility regarding travel records, an ALJ should sustain those costs).

Claimant's "Mileage Reimbursement Form" includes 7 entries representing 16.4-mile round-trip distances for "RX," which ostensibly refers to trips for medications, on December 28, 2001, January 8, 2002, February 12 and 25, 2002, March 12, 2002, April 9, 2002, and May 7, 2002. The entries, to which Employer/Carrier did not object, appear reasonably and necessarily related to Claimant's medical treatment for his compensable injury and shall not be reduced or denied. However, Claimant's January 28, 2002 entry representing a 32-mile trip to his attorney's office is related to vocational rehabilitation, which appears unrelated to his medical treatment. Consequently, Claimant's mileage request is hereby reduced by 32 miles.

In consideration of the above reduction, Claimant's total mileage reimbursement request, which was otherwise not challenged by Employer/Carrier, represents a total request of 1,284.80 miles (1,316 miles – 32 miles = 1,284.80 miles).

Pursuant to 18 U.S.C. § 1821(c)(2), which provides for a travel allowance equal to the mileage allowance prescribed by the Administrator of General Services for Federal employees who travel by privately owned vehicles on official business, the applicable rate to reimburse mileage effective from January 22, 2001 until January 20, 2002 was .345 cents.[9] Five of Claimant's

[9] U.S.G.S.A., Privately Owned Vehicle Rates (POR) <http:// http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=9646&contentType=GSA_BASIC> (last updated May 26, 2004).

compensable entries representing 241.00 miles occurred during this period, resulting in his entitlement to a reimbursement of $83.15 (241.00 miles x .345 cents = $83.15). The rate which became effective on January 21, 2002 was .365 cents. The rest of Claimant's compensable entries, representing a total of 1,043.80 miles (1,284.80 miles – 241.00 miles = 1,043.80 miles), results in his entitlement to a reimbursement of $380.99 (1,043.80 miles x .365 cents = $380.99). Claimant's total reimbursement for his reasonable and necessary travel expenses for his medical treatment is thus $464.14 ($83.15 + $380.99 = $464.14).

4. Unpaid Medical Bills

Claimant testified that he incurred expenses in the amount of $300.00 at an emergency room related to his cervical complaints. He did not indicate whether he requested Employer/Carrier's prior authorization before undergoing the medical treatment. Claimant's testimony fails to establish that he treated at the emergency room under emergency conditions which would obviate the need to seek Employer's authorization prior to his treatment. Assuming **arguendo** that Employer's consent was not required, the record does not adequately establish whether Claimant incurred the costs for medical treatment that was reasonable or necessary for the treatment of his compensable injury. The record fails to establish what procedures were performed on any dates on which Claimant went to the emergency room. Consequently, I find Claimant failed to establish his medical expenses of $300.00 were reasonable.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer began voluntarily paying compensation benefits on December 18, 2000, but also filed a Notice of Controversion on December 19, 2000. Employer/Carrier continued paying disability benefit payments through April 24, 2001, when they discontinued Claimant's benefits. They filed a June 11, 2001 LS-208 "Notice of Final Payment or Suspension of Compensation Payments" indicating the grounds for their April

24, 2001 decision to unilaterally discontinue compensation benefits.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due[20] Thus, Employer was liable for Claimant's permanent total disability compensation payment on December 27, 2000. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by January 10, 2001, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer filed a timely notice of controversion on December 19, 2000, and is not liable for Section 14(e) penalties through April 24, 2001.

Thereafter, Employer/Carrier were obligated to file a notice of controversion when a dispute arose concerning Claimant's ongoing entitlement to compensation benefits. See generally Lorenz v. FMC Corp., Marine & Rail Equip. Div., 12 BRBS 592, 595 (1980) (a notice of controversion must be filed whenever a dispute arises over the amount of compensation due, even if some compensation is voluntarily paid); Browder v. Dillingham Ship Repair, 25 BRBS 88, 90-91 (1991)(if the employer fails to controvert the disputed portion, a Section 14(e) penalty may be assessed against that amount); White v. Rock Creek Ginger Ale Co., 17 BRBS 75, 78-79 (1985) (a notice of suspension filed within fourteen days of cessation of payments which provides the information required by Section 14(d), including the reasons for suspension, is the functional equivalent of a notice of controversion and precludes application of the Section 14(e) ten percent assessment).

I find Employer/Carrier's June 11, 2001 LS-208 "Notice of Final Payment or Suspension of Compensation Payments" was not timely filed after their April 24, 2001 decision to unilaterally suspend Claimant's compensation benefits. However, as discussed above, the record establishes Claimant suffered no loss of post-injury wage-earning capacity from April 23, 2001 through April 30, 2003. Consequently, no compensation was due to Claimant for the period of time from April 24, 2001 through June 11, 2001, the date of Employer/Carrier's functional equivalent of a notice

[20] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

of controversion. Employer is therefore not liable for penalties under Section 14(e) of the Act.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[21] A

[21] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981),

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from December 13, 2000 through April 22, 2001, based on Claimant's average weekly wage of $256.30, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for temporary total disability from May 1, 2003 to present and continuing, based on Claimant's average weekly wage of $256.30, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

3. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's December 13, 2000 work injury, including $464.14 in reasonable and necessary travel expenses, pursuant to the provisions of Section 7 of the Act.

4. Employer/Carrier are not liable for the cost of a recommended discogram or alleged emergency room medical expenses of $300.00 which have not been established as reasonable and necessary on these facts, as discussed herein.

5. Claimant is entitled to Dr. John McCloskey as his choice of physician.

6. Employer shall not be liable for an assessment under Section 14(e) of the Act.

7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

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aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **April 2, 2003**, the date this matter was referred from the District Director.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 30th day of June, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge